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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 NAJIB ALI ADEN,
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11 Petitioner,

12 v.

13 KIRSTJEN NIELSEN, *et al.*,
14
15 Defendant.

Case No. C18-1441RSL

ORDER GRANTING IN PART
PETITIONER'S MOTION FOR
ATTORNEY'S FEES

16 This matter comes before the Court on "Petitioner's Motion for Attorney's Fees
17 and Expenses Under the Equal Access to Justice Act." Dkt. # 28. Having reviewed the
18 memoranda, declarations, and exhibits submitted by the parties, the Court finds as
19 follows:

20 1) On June 20, 2019, the Court found that the Department of Homeland Security
21 ("DHS") had failed to exercise its discretion to designate a country of removal outside of
22 removal proceedings in a manner consistent with 8 U.S.C. § 1231(b) or the Due Process
23 Clause. The Court also found that petitioner was entitled to a bond hearing. The
24 government does not dispute that petitioner is the prevailing party in this matter for
25 purposes of an award of fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C.
26 § 2412(d)(1)(B).

ORDER GRANTING IN PART
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ATTORNEY'S FEES - 1

1 2) Petitioner has shown, and respondents do not dispute, that he is eligible for an
2 award of fees under the EAJA: his net worth did not exceed \$2,000,000 at the time this
3 action was filed. 28 U.S.C. § 2412(d)(1)(B).

4 3) Because petitioner is an eligible, prevailing party, there is a presumption that
5 fees will be awarded in this case. See Ibrahim v. U.S. Dep't of Homeland Sec., 912 F.3d
6 1147, 1167 (9th Cir. 2019) (quoting Comm'r INS v. Jean, 496 U.S. 154, 158, 163-64
7 (1990)). Defendants can rebut the presumption, however, by showing that the agency's
8 underlying action and its litigation position were "substantially justified or that special
9 circumstances make an award unjust." 28 U.S.C. § 2412(d)(1)(A). A position is
10 substantially justified "if it has a reasonable basis in law and fact." Thangaraja v.
11 Gonzales, 428 F.3d 870, 874 (9th Cir. 2005) (internal quotation marks and citation
12 omitted).

13 4) The government argues that its pre-litigation and litigation positions were
14 substantially justified because (a) DHS had a reasonable basis in law and fact for
15 designating Somalia as the country of removal when Kenya refused to accept petitioner;
16 (b) a reasonable person could find that DHS provided petitioner with adequate notice that
17 he was to be deported to Somalia; and (c) a reasonable person could find that, by agreeing
18 to stay petitioner's removal to allow him to seek to reopen his removal proceedings, DHS
19 provided petitioner with an adequate opportunity to have his asylum claim heard. The
20 first and third positions were substantially justified: the Court recognized DHS' authority
21 to designate a country of removal outside post-removal order and acknowledges that the
22 procedures for reopening removal proceedings to hear an asylum claim in that context
23 were not clear at the time.

24 The government's ability to identify discrete issues on which its position may have

1 been substantially justified does not cure or avoid the unreasonable agency action that
2 instigated this litigation, however.¹ The government was constitutionally obligated to give
3 petitioner notice of the country to which he was being deported using procedures
4 sufficient under the circumstances to give him a reasonable opportunity to raise and
5 pursue his asylum claim. Mathews v. Eldridge, 424 U.S. 319, 348-49 (1976); Kossov v.
6 INS, 132 F.3d 405, 408 (7th Cir. 1998) (Immigration Judge’s failure to inform
7 noncitizens, who were pro se, that they had the right to seek asylum was a “fundamental
8 failure of due process”). The government’s reliance on the deportation officer’s statement
9 of intent to seek travel documents from Somalia is, given petitioner’s capabilities and
10 circumstances in this case, insufficient. It is undisputed that petitioner objected to removal
11 to Somalia and refused to cooperate with that effort. He was told, however, that he should
12 wait and see if the travel documents were forthcoming before attempting to challenge the
13 newly-designated country of deportation. Once the travel documents were issued, the
14 government did virtually everything in its power to deport petitioner before he could
15 claim asylum, much less be heard by a fair and impartial decisionmaker. The agency, with
16 travel documents to Somalia in hand, tricked petitioner into coming to the agency’s
17 office, detained him without notice, transported him to a staging facility in Louisiana, and
18 refused to tell him what they were planning to do with him. That plaintiff ultimately
19 figured out that he was being removed to Somalia and took steps to stop the unlawful
20 deportation does not mean that the government provided the process that was due.

21 This due process violation is at the crux of this lawsuit. Petitioner specifically
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23 ¹ See Ibrahim, 912 F.3d at 1171 (“That some of the arguments made along the way
24 by the government attorneys passed the straight face test until they were reversed on
appeal does not persuade us that the government’s position was substantially justified.”).

1 alleged that the last minute notice that he was being removed to Somalia deprived him of
2 a meaningful opportunity to apply for relief and prevented the government from making
3 findings that are necessary under the governing statute. Those claims were adjudicated in
4 petitioner's favor. Respondents' subsequent willingness to allow petitioner time in which
5 to seek to reopen the removal proceedings and request asylum does not cure the original
6 unlawful action. The agency's position was not substantially justified, and petitioner
7 prevailed on his due process claim: an award of EAJA fees is therefore appropriate.

8 5) Petitioner seeks an award of \$51,310 in fees and expenses based upon an hourly
9 rate of \$450 per hour for 109.2 hours of work and an additional \$2,170 in expenses for
10 the time spent by declarants Robert H. Gibbs and Devin T. Theriot-Orr in supporting the
11 fee request. The Court is authorized to award fees above the statutory rate of \$125 per
12 hour, adjusted for inflation, when "a special factor, such as the limited availability of
13 qualified attorneys for the proceedings involved, justifies a higher fee." 28 U.S.C.
14 § 2412(d)(2)(A)(ii).

15 6) Petitioner has demonstrated, and respondents do not dispute, that his counsel
16 has "distinctive knowledge" and "specialized skill" regarding both immigration law and
17 litigation. Nadarajah v. Holder, 569 F.3d 906, 912 (9th Cir. 2009). Respondents argue,
18 however, that counsel's skills were not necessary in this litigation because it was a
19 relatively simple matter involving "a single petitioner seeking relief that the government
20 had already agreed to give him - a stay of removal and an opportunity to present an
21 asylum or other withholding claim before an Immigration Judge before being removed to
22 Somalia." Dkt. # 30 at 7-8. Respondents offer no evidence or authority in support of this
23 contention, and the Court cannot agree with their characterization of the case. Counsel
24 had to, and did, convince the Court that the government's change in position did not moot

1 the earlier due process violation or otherwise provide the notice and opportunity to be
2 heard that was his due. Two immigration specialists describe this case as falling at the
3 intersection of an intricate statutory scheme and the Due Process Clause, with few
4 practitioners skilled enough to handle the issues, much less handle them on an emergency,
5 expedited basis. Dkt. # 28-3 at ¶¶ 12-17; Dkt. # 28-4 at 1-2. Counsel and the two
6 immigration specialists urge that the specialized knowledge and skill necessary for this
7 case was not available elsewhere at the statutory rate, even when adjusted for inflation.
8 The Court finds that counsel is entitled to a fee above the statutory rate and that \$450 per
9 hour is reasonable in this context.

10 8) The Court also finds that, as a general matter, the number of hours spent on this
11 litigation was imminently reasonable. Counsel spent a mere eleven hours researching,
12 drafting, and filing the habeas petition and request for a restraining order. His response to
13 the motion to dismiss, research into discovery options, review and response to the Report
14 and Recommendation, and preparation of the fee petition were conducted in far less time
15 than the Court would have expected to see based on its review of time records over the
16 past two decades. Case management activities and client communications were likewise
17 efficient and appropriate. All hours associated with those activities are recoverable at the
18 rate of \$450 per hour. Fees will not, however, be awarded for the stage of the litigation
19 wherein petitioner sought to enforce the Court's prior order directing respondents to
20 provide a bond hearing. That phase of the litigation was unsuccessful and is entirely
21 separate - substantively and procedurally - from petitioner's successful efforts to obtain
22 habeas relief.

23 9) Petitioner has shown, and respondents do not dispute, that the expenses incurred
24 to support his fee petition are reasonable.

1 For all of the foregoing reasons, petitioner's motion for attorney's fees and
2 expenses (Dkt. # 28) is GRANTED in part. The Court awards \$36,720 in reasonable
3 attorney's fees and \$2,170 in reasonable expenses under the EAJA.
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5 Dated this 6th day of December, 2019.
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8 Robert S. Lasnik
9 United States District Judge
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